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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA
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9 FATIMA PADILLA, by and through her)
mother; MARIA GUEVARA; ROSA)
10 LOPEZ; MARCELINO GRIJALVA-)
LOPEZ; GUILLERMO LUJAN; DORA)
11 MORALES; and JOSE DAVID)
CASSANOVA, on behalf of themselves)
12 and a class of persons similarly situated,)

13 Plaintiffs,)

14 v.)

15 ANTHONY RODGERS, Director of the)
Arizona Health Care Cost Containment)
16 System, and MICHAEL LEAVITT,)
Secretary of Health and Human Services, in)
17 their official capacities,)

18 Defendants.)
19

No. CV 02-176 TUC-FRZ

CONSENT DECREE

20 Plaintiffs filed this action on their own behalf and on behalf of a class of similarly
21 situated persons with End Stage Renal Disease. In the Second Amended Complaint,
22 Plaintiffs alleged that Defendant Rodgers changed the definition of emergency medical
23 services under the Arizona Health Care Cost Containment System (“AHCCCS”) program to
24 exclude coverage for kidney dialysis treatments/services and to require a “sudden onset” for
25 coverage in violation of the federal Medicaid Act. Specifically, Defendant Rodgers changed
26 the AHCCCS policies in the Provider Manual and in administrative rule R9-22-217. In
27 addition, Plaintiffs alleged that Defendant Rodgers eliminated the ability of providers to
28 receive prior authorization for kidney dialysis services. Finally, Plaintiffs alleged Defendant

1 Rodgers failed to provide adequate notice and an opportunity for a pre-termination hearing
2 of kidney dialysis services in violation of 42 U.S.C. § 1983.

3 Plaintiffs filed a Motion for Preliminary Injunction and Motion for Class Certification.
4 A provisional class was certified on September 24, 2002, and modified on October 7, 2002.
5 The class was defined as:

6 The class shall consist of all persons who are or will be eligible
7 for federal emergency medical services under the AHCCCS
8 Title XIX program, whose end-stage renal disease meets the
9 definition of 'emergency medical condition' set forth in 42
10 U.S.C. § 1396 b(v)(3) and for whom their physicians have
11 prescribed outpatient hemio-dialysis treatments three times
12 weekly. The class includes all those individuals who, pursuant
13 to AHCCCS's Title XIX 'extended services' program, had been
14 receiving outpatient dialysis prior to November 1, 2001, and for
15 whom treatment has been continued pursuant to S.B. 1007.

16 In Court Orders entered on June 17, September 24, and October 7, 2002, a preliminary
17 injunction for the class was granted that prohibited Defendant Rodgers from limiting access
18 to dialysis to Plaintiffs and the provisional class and required AHCCCS to provide coverage
19 of medically necessary outpatient dialysis treatment as an emergency medical service.

20 Pursuant to the Court's Order of June 17, 2002, Tommy Thompson, Secretary of the
21 Department of Health and Human Services was named as a Defendant in this action in an
22 amended complaint filed on July 16, 2002. Subsequently, the Secretary filed a motion to
23 dismiss him as a Defendant which was granted on November 26, 2002. On June 16, 2004,
24 this Court reinstated Defendant Thompson as a named defendant in this action to ensure that
25 the preliminary injunction provisions were abided to by Defendant Thompson.

26 The Plaintiffs and Defendant Rodgers have agreed to resolve this matter without
27 further proceedings.

28 The parties have agreed that upon the entry of this Consent Decree, the parties will
submit a stipulation to dismiss Defendant Michael Leavitt as successor to Defendant Tommy
Thompson as Secretary of Health and Human Services as a party.

The parties do not object to the jurisdiction of the Court over this action and waive
their right to a hearing and entry of findings of fact and conclusions of law.

1 The Court, after reviewing the terms of the Consent Decree, the pleadings in this case
2 and any comments from the class members, finds:

3 1. For the purposes of this Consent Decree, the class is defined as previously
4 certified on October 7, 2002.

5 2. This settlement requires AHCCCS to provide coverage for medically necessary
6 outpatient kidney dialysis as an emergency medical service and for the notice and an
7 opportunity to be heard for AHCCCS denials and termination of coverage service for
8 outpatient kidney dialysis.

9 3. The parties provided notice to the class of this settlement by January 12, 2007,
10 and a fairness hearing was held on February 26, 2007.

11 4. There were no written or oral objections to this decree.

12 5. This settlement is fair, reasonable and adequate pursuant to Rule 23 (e)(1) (C)
13 of the Federal Rules of Civil Procedure.

14
15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

16 1. This Consent Decree resolves all the claims of Plaintiffs and the class against
17 Defendant Rodgers arising out of this lawsuit.

18 2. This Consent Decree is final and binding upon the parties, their successors and
19 assigns.

20 DEFENDANT RODGERS' ACTIONS

21 3. Defendant Rodgers, his officers, agents, employees, successors and assigns
22 and all persons in active concert or participation with him, for the duration of the decree, are
23 permanently enjoined from:

24 A. Failing to provide coverage for medically necessary outpatient kidney
25 dialysis treatment as an emergency medical service under Medicaid
26 ("emergency medical services") for persons with End Stage Renal Disease.
27 By this injunction, AHCCCS returns to the policies it utilized prior to October
28 2001.

1 B. Failing to provide for prior authorization for coverage for medically
2 necessary outpatient kidney dialysis services based upon a physician's monthly
3 certification of the following:

4 I am the treating physician for [member's name],
5 who has been diagnosed with end-stage renal
6 disease (ESRD). It is my opinion that in the
7 absence of the following dialysis treatments per
8 week, the patient's ESRD would reasonably be
9 expected to result in:

- Placing the patient's health in serious jeopardy;
- Serious impairment of bodily function; or
- Serious dysfunction of a bodily organ or part.

10 It is my medical opinion that _____ requires
11 _____ dialysis treatments per week.

12 _____
Signature

Date

13 C. Failing to provide adequate notice and an opportunity for a pre-
14 termination hearing pursuant to 42 U.S.C. § 1396 (a) and 42 C.F.R. § 431.200
15 *et seq.*, when AHCCCS terminates coverage of outpatient kidney dialysis
16 treatment as an emergency medical service for any member of the class.

17 D. Failing to provide adequate notice and an opportunity for a hearing
18 pursuant to 42 U.S.C. § 1396 (a) and 42 C.F.R. § 431.200 *et seq.*, on any
19 claim for outpatient kidney dialysis services that is denied as an emergency
20 medical service.

21 4. To effectuate the above provisions, Defendant Rodgers shall take the following
22 actions:

23 (A) Within 60 days of entry of this decree, Defendant shall change sections
24 of the AHCCCS policy manuals to affirmatively state that medically
25 necessary outpatient kidney dialysis services are provided as an
26 emergency medical service.

27 (B) Within 270 days of entry of this decree, Defendant shall change the
28 administrative rule R9-22-217 to affirmatively state that medically

1 necessary outpatient kidney dialysis services are provided as an
2 emergency medical service.

3 (C) Within 30 days of entry of this decree, Defendant shall post a notice on
4 the AHCCCS website of the terms of this Consent Decree, including
5 information about how persons may contact Plaintiffs' counsel if they
6 are having any problems obtaining medically necessary outpatient
7 kidney dialysis treatment as an emergency medical service. This notice
8 shall remain on the website for the duration of the decree.

9 (D) Within 30 days of entry of this decree, Defendant shall send a notice to
10 all Plaintiffs and class members who are presently receiving dialysis
11 treatment for end-stage renal disease, notifying them of the terms of this
12 Consent Decree and include information about how the class members
13 may contact Plaintiffs' counsel if they are having any problems
14 obtaining medically necessary outpatient kidney dialysis treatment.

15 (E) Within 30 days of entry of this decree, Defendant shall send a notice to
16 all hospitals, dialysis clinics, nephrologists, and internists notifying
17 them of the terms of this Consent Decree and include information about
18 how they may contact Plaintiffs' counsel if they are having problems
19 obtaining medically necessary outpatient kidney dialysis treatment for
20 a client as an emergency medical service.

21 (F) Within 60 days of entry of this decree, Defendant shall provide notice
22 of this Consent Decree and include information about how persons may
23 contact Plaintiffs' counsel if they have questions concerning the
24 Consent Decree in the quarterly publication "Claims Clue" sent to all
25 providers.

26 (G) Within 30 days of entry of this decree, Defendant shall notify his
27 employees and agents (including staff at the Arizona Department of
28 Economic Security) of the terms of this Consent Decree and of the

1 actions in paragraphs (a) - (c) above.

2 (H) Defendant shall provide each of the documents identified in paragraphs
3 (a) - (f) above to Plaintiffs' counsel for review and approval within 45
4 days of entry of this decree.

5
6 TRAINING

7 5. Defendant shall provide training to his employees and agents, including staff
8 at the Arizona Department of Economic Security on the terms of this Consent Decree within
9 30 days of entry of this decree. Staff to be trained shall include intake and eligibility
10 workers, supervisors and quality review staff.

11 REPORTING/MONITORING

12 6. Within 60 days of entry of this decree, and every four (4) months thereafter,
13 Defendant shall provide Plaintiffs' counsel an affidavit by Defendant Rodgers stating that
14 the actions required in paragraph four (4) of this decree are still in effect.

15 ATTORNEYS' FEES AND COSTS

16 7. Defendant agrees that Plaintiffs' counsel are entitled to attorneys' fees and
17 costs.

18 8. Within 30 days of entry of this decree, Plaintiffs' counsel shall submit a request
19 for attorneys' fees and costs to Defendant Rodgers. If the parties are unable to agree to an
20 award of attorneys' fees and costs for Plaintiffs, then Plaintiffs shall file a bill of costs and
21 motion for attorneys' fees and costs pursuant to Local Rules 54.1 and 54.2. In response to
22 the motion for attorneys' fees, Defendant Rodgers could not challenge Plaintiffs' entitlement
23 to fees and costs, but only the amount of the request. Plaintiffs' time to file the bill of costs
24 and motion for attorneys' fees shall be extended to 60 days after Plaintiffs submit their
25 written request to Defendant Rodgers. Plaintiffs shall have an additional 30 days to submit
26 their Memorandum in Support of Motion for Attorneys' Fees and all supporting
27 documentation.

28 LIMITATIONS

9. No provision of this decree shall infringe upon any applicant's right to seek relief against Defendant in the appropriate forum for an alleged violation of the Medicaid Act not addressed in this decree.

ENFORCEMENT

10. The provisions of this decree shall remain in effect for the duration of this decree unless there is a change in the federal Medicaid statute that directly affects the Federal Emergency Services program under Title XIX. If Defendant believes that a change in the federal Medicaid statute directly affects the terms of this decree, Defendant shall give Plaintiffs' counsel notice of the change within 30 days of when Defendant found out about the change. The notice shall include the following:

- a. The federal change in law;
- b. When Defendant was informed of the change;
- c. The manner in which Defendant believes the change affects the terms of the decree; and
- d. The basis of Defendant's conclusion in paragraph c.

Plaintiffs shall have 30 days from receipt of the notice to either advise Defendant that Plaintiffs agree with Defendant's interpretation or that they disagree and will file a motion in court to request judicial intervention or interpretation.

11. At least 30 days prior to filing a motion for enforcement or contempt of this Consent Decree based upon a claimed violation by Defendant, Plaintiffs shall provide written notice to Defendant of the nature and specifics of the claimed violation in order to give Defendant an opportunity to cure the alleged violation(s).

JURISDICTION

12. The duration of this decree is twenty-four months from the date the Consent Decree is filed with the Court.

13. The Court shall retain jurisdiction over this action for twenty-four months and any additional time period necessary for any enforcement and contempt action commenced before the expiration of the twenty-four month period, during which Plaintiffs may petition


1 this Court for compliance with the decree.

2 14. Notwithstanding any provisions in this decree, including but not limited to
3 paragraph 8 concerning attorneys fees and costs and paragraph 13 concerning the twenty-four
4 month period of this decree, there is no just reason for delay in the entry of this Consent
5 Decree and Entry of Judgment by the Clerk of the Court is expressly directed pursuant to
6 Rule 54(b) of the Federal Rules of Civil Procedure.

7 15. The failure of Defendant to implement or otherwise execute any of the agreed
8 upon terms of this decree shall constitute a violation of the order of this Court and shall be
9 fully enforceable by this Court.

10 16. The parties agree to entry of this Consent Decree, subject to final approval by
11 the Court.

12
13 DATED this 16th day of March, 2007.

14
15 
16 FRANK R. ZAPATA
17 United States District Judge

18 APPROVED AND CONSENTED TO:

19 WILLIAM E. MORRIS INSTITUTE
20 FOR JUSTICE

JOHNSTON LAW OFFICES PLC

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